APPENDIX

OPINIONS BELOW

Order of the Supreme Court of Appeals of Virginia

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 27th day of April, 1966.

The petition of Dave Rosenbloom for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 11th day of June, 1965, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

A Copy,

Teste:

H. G. TURNER
Clerk

Oral Opinion of the Hustings Court of the City of Richmond, Virginia

Entered June 11, 1965 (T. 141-143)

The Court: Gentlemen, the Court has considered the memorandums of counsel for Mr. Rosenbloom and for the Commonwealth and has conducted its own investigation of the law and consideration of the record. I have passed to the counsel for the defendant a memorandum of the statutes that are involved and of the United States Court decision, which I think is applicable to the case. I first as I have said in there, to constitute an offense under the statute the evidence—have to establish beyond a reasonable doubt that the magazines considered as a whole have as their dominant theme or purpose an appeal to prurient interest, have a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in describing or representing of such matters. That is the definition as set forth in the statute and that is the controlling definition that the Court has to be guided by and I first, of course, have to find that the defendant knowingly sold these items or had in his possession such items.

I hold that the magazines exhibited in the evidence are obscene as defined by the statute, and, second, that the motions to quash the warrant and suppress the evidence is denied, primarily, of course, by the fact that if I find that they are obscene or lewd, the law is that they are not protected by the First and Fourteenth Amendments, and the Supreme Court has taken the position, our Supreme Court in the Roth case, has held in defining obscenity that the

material utterly without social importance as a test, and as a test is whether average persons applying community standards the dominant theme of the material as a whole appears to prurient interests. I am not impressed with the argument that it is benefits—emotional benefits—to be derived from nudism is of sufficient social importance to relieve him of that absolutely, and I find that he had them in his possession and he offered them for sale.

All right stand up. The Court finds you guilty as charged and sentences you to pay a fine of twenty-five dollars. I will say this Mr. Horwitz, you certainly did prepare an exhaustive brief and the judgment of the Court is largely guided by the definition of our Virginia statute.

Memorandum Opinion of the Hustings Court of the City of Richmond, Virginia

Entered June 11, 1965

MEMORANDUM OPINION

The following Sections of the Code are the basis of the complaint against the defendant:

ARTICLE 3

Obscenity

Section 18.1-227. *"Obscene" defined.*—The word "obscene" where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

Section 18.1-228. *Production, publication, sale, possession, etc., of obscene items.*—"Every person who knowingly:

(1) • • • or

(2) • • • or

(3) Publishes, sells, rents • • • or commercially distributes or exhibits any obscene item, or offers to do any of these things or

(4) Has in his possession with intent to sell, rent, lend, transport or commercially distribute any obscene item shall be guilty of a misdemeanor. Possession in public or in a public place of any obscene item as defined in this article

shall be deemed prima facie evidence of a violation of this section."

Section 18.1-229. *Obscene items enumerated*—Obscene items shall include:

(1) "Any obscene book; or

(2) Any obscene leaflet, pamphlet, magazine, booklet, picture, painting, drawing, photograph, film, negative, slide, motion picture; or

(3) Any obscene figure, object, article, instrument, novelty device or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words or sounds."

OPINION OF COURT

To constitute an offense under the statutes the evidence must establish beyond a reasonable doubt:

(1) That the magazines considered as a whole have as "their dominant theme or purpose an appeal to prurient interest, that is a shameful or morbid interest in nudity, sex or excretion: and if it goes substantially beyond customary limits of candor in description or representation of such matters."

(2) That the defendant knowingly:

(a) • • • sold, exhibited or commercially distributed an obscene item; or offered to do any such thing.

(b) Or had in his possession, such obscene items with intent to sell or commercially distribute.

The Court holds:

I. That the magazines exhibited in evidence are "obscene" as defined by the statutes.

II. Motions to quash the warrants and suppress the evidence is denied.

That neither the First and Fourteenth Amendments of the Constitution of the United States nor Article 1, Section 12 of the Virginia Constitution affords protection from State action against obscene material.

Roth v. U.S., 354 U.S. 476; 481.

The Constitution does guarantee freedom for ideas "having even the slightest redeeming social importance; even unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of public opinion."

However the United States Supreme Court has defined obscenity as material "utterly without redeeming social importance" and as a test "whether to the average person, applying community standards, the dominant theme of the material as a whole appeals to prurient interest."

Roth v. U.S., 354 U.S. 476; 481.

It has been stressed by the defendant in argument that the magazines are designed to foster the emotional benefits to be obtained from "Nudism"—to produce Healthy Minds and Bodies. The Court is not impressed with that argument: "so much manure and so little grass." It holds that the material is "utterly without redeeming social importance".

III. That the Defendant, had in his possession and exhibited and sold such obscene items in his store in the City of Richmond open to the public.

IV. That Defendant knowingly so acted; and offered them for sale.

SAM B. WITT, JR.

Exceptions Noted to Orders of the Hustings Court of the City of Richmond

Trial March 22, 1965

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

Pleas at the Courthouse of the City of Richmond, before the Hustings Court of said City, on the 12th day of August, 1965.

Be it remembered that heretofore, to-wit: on the 22nd day of March, 1965, the following order was entered:

APPEAL

COMMONWEALTH

vs.

DAVE ROSENBLOOM,

Defendant.

Judge Witt

The said defendant this day appeared and was set to the bar in the custody of the Sergeant of this City. And the said defendant moved the Court to suppress the evidence in this case and to quash the warrant, which motions the Court doth overrule and the said defendant excepts. And being then arraigned, the said defendant pleaded not guilty to violating Section 18.1-228 of the Code of Virginia in that he did have in his possession and exhibit for the

purpose of selling certain obscene books and he did sell one obscene book to Police Officer N. J. Hunt, as charged. And with the consent of the accused, given in person, and the concurrence of the Court and the Attorney for the Commonwealth, the Court proceeded to hear and determine this case without a jury. And having heard the evidence for the Commonwealth, the said defendant moved the Court to strike the evidence for the Commonwealth as being insufficient for the finding of a judgment of guilty, which motion the Court doth also overrule and the said defendant excepts. And having heard all of the evidence, this case is continued to a later date for submission of written briefs by the Commonwealth and the defense. And thereupon the said defendant is released on continuing bail.

Hearing, June 11, 1965

VIRGINIA:

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

And at another Hustings Court held for the City of Richmond, at the Courthouse, on the 11th day of June, 1965, the following order was entered:

APPEAL

COMMONWEALTH

vs.

DAVE ROSENBLOOM,

Defendant.

Judge Witt

The said defendant this day again appeared and was set to the bar in the custody of the Sergeant of this City. And having plead not guilty to violating Section 18.1-228 of the Code of Virginia in that he did have in his possession and exhibit for the purpose of selling certain obscene books and he did sell one obscene book to Police Officer N. J. Hunt, as charged, and the Court having heard evidence and this case having been continued for the submission of written briefs by the Commonwealth and the Defense as entered herein on March 22, 1965, and said written briefs having been submitted, the Court doth this day find the said defendant guilty as charged and doth assess his fine at twenty five dollars.

Whereupon the said defendant moved the Court to set aside its judgment as being contrary to the law and to the evidence and grant him a new trial, which motion the Court doth overrule and to which action of the Court in overruling his said motion, the said defendant notes an exception, and time is allowed him not to exceed sixty days in which to file his bills of exceptions.

Whereupon it is considered by the Court that the said Dave Rosenbloom pay and satisfy a fine of twenty five dollars and costs.

The said defendant then moved the Court to suspend the execution of the said sentence to allow him to appeal his case to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas, which motion the Court doth grant and the execution of the said sentence is suspended to August 11, 1965, and his bond is set at one hundred dollars.

And thereupon the said defendant entered into a recognizance in the sum of one hundred dollars, cash security, furnished by himself, conditioned that if the said defendant shall abide by and perform the judgment of this Court in the event the Supreme Court of Appeals of Virginia shall refuse to grant him a writ of error and supersedeas, or if granted it be later dismissed and appear before this Court on August 11, 1965, and in the meantime shall keep the peace and be of good behavior and violate none of the laws of this Commonwealth, then this recognizance to become null and void, else to remain in full force and virtue. And thereupon the said defendant is released.

Motions Made by Petitioner

Excerpt from Motion to Quash, filed February 24, 1965:

"Defendant . . . respectfully moves the Court to quash and dismiss the warrant filed against him . . . for the following reasons:

* * * * *

d. That the publications which the defendant is accused of possessing, offering to sell and selling are, as a matter of law, not obscene and therefore are privileged under Amendment I to the Constitution of the United States of America and § 12 of the Constitution of Virginia.

Oral Motion to Strike the Evidence

(T. 51, 52)

Mr. Horwitz: I think the Commonwealth is willing to stipulate that the law governing this case is a decision handed down by the Supreme Court, Sunshine Book Company et al. v. Summerfield, in 355 U. S. 372, in which the subject of nudist magazines was adjudicated.

Mr. Wilkinson: Judge, I don't stipulate law, because I don't think that it's a case there. I understood about the Matt case and some other cases—that the law—I mean, we don't have to stipulate that.

The Court: I don't think you have to stipulate it either—

Mr. Wilkinson: If that is the law then that is the law. The Court might disagree with the law—

Mr. Horwitz: I make the motion to strike the evidence of the Commonwealth based upon their evidence and when applied to this law which is clearly set out, that the nude human figure supposedly showing the genital area and pubic areas is not per se obscene; that nudist magazines are subject to mailing privileges and this was the reason for this case; that the evidence of the Commonwealth at this point is based on—

The Court: Mr. Horwitz I have—I must frankly admit that I am not familiar with the case, but you are making a motion, and I will, of course, consider any authority that you have in support of it, but I am not going, at this time, strike the Commonwealth's evidence. I will overrule your motion and you may have an exception.

Mr. Horwitz: Yes, sir.

The Court: But I would like a reference to your case, what is it, Sunshine— What—

Mr. Horwitz: Sunshine Book Company et al. v. Summerfield, 355 U. S. 377—372.

The Court: 355 U. S.

Mr. Horwitz: 372.

The Court: 372. All right.

Mr. Horwitz: I would also like to cite the cases that preceded that—

The Court: Well they are cited in that case, I imagine, all right, sir, but I will overrule your motion at this time.